Tapestries: Interwoven voices of local and global identities

Volume 3
Issue 1 *Generational Politics, Spring 2013*

Article 10

5-7-2013

The Generational Fight for Affirmative Equality: Understanding and Dismantling the Assault on Affirmative Action

Leewana Thomas
Macalester College, lthomas@macalester.edu

Kiah Zellner-Smith
Macalester College, kzellner@macalester.edu

Aaron Brink-Johnson
Macalester College, abrinkjo@macalester.edu

Felicia Johnson
Macalester College, fjohnso1@macalester.edu

Isela X. Gomez
Macalester College, igomez@macalester.edu

See next page for additional authors

Authors
Leewana Thomas, Kiah Zellner-Smith, Aaron Brink-Johnson, Felicia Johnson, Isela X. Gomez, Jocelyne I. Cardona, Maya Vilaplana, Ryan Brownlow, Whitney Zilton, and Grace Zaiman

The Generational Fight for Affirmative Equality: Understanding and Dismantling the Assault on Affirmative Action

Leewana Thomas, Kiah Zellner-Smith, Aaron Brink-Johnson, Felicia Johnson, Isela Gomez, Jocelyne Cardona, Maya Vilaplana, Ryan Brownlow, Whitney Zilton and Grace Zaiman

Introduction

In this paper, we aim to examine the current Supreme Court case, Fisher v. Texas University at Austin, a case that threatens to rebuke the legality of affirmative action in the United States. In order to provide a context for the case, we will outline the cases that have established and upheld segregation, desegregation, and affirmative action in the United States, beginning with Plessy v. Ferguson, and culminating with Fisher. We will discuss anticipated arguments from both sides and we will use a critical race theorist framework to analyze the potential implications of a ruling. We argue that this case is not only about affirmative action but also about the delineation of property and white supremacy within affirmative action caselaw. In the end, whom will the broken system of the law protect?

Dred Scott v. Sandford marked the beginning of the law's failure to ensure equal treatment of all people. After being denied the choice to buy his freedom in 1857, Dred Scott unsuccessfully sued for his and his family's freedom. The Supreme Court ruled that no one of African descent could claim U.S. citizenship or protection under U.S. law. .The court, led by Justice Roger B. Taney, held that Dred Scott's body (marked by his blackness) belonged to his owner. In 1868, the newly adopted 14th Amendment overruled the court's ruling with a new definition of citizenship:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Even though the amendment granted citizenship to all people "born or naturalized" in the U.S., this amendment was "designed to guarantee political equality not to enforce social equality." In other words, the law granted all citizens the opportunity to take part in the democracy but this did not mean it would protect and treat all citizens equally. Neither would all citizens' rights and property be recognized by the state.

After gaining citizenship, people of color were seen as "separate but equal" by the law in 1896 by the country after the ruling of Plessy v. Ferguson. Public spaces and schools were segregated for sixty years until 1954 with Brown v. Board of Education. In 1955, Brown II forced states to desegregate schools with "all deliberate speed." Twenty-five years later the decision of Brown v. Board was re-examined. We have been detracting ever since.

In 2012, the Supreme Court agreed to once again re-examine affirmative action in Fisher v. University of Texas at Austin. In this case, Ms. Abigail Fisher, a white woman from Texas is asking the Supreme Court to assess University of Texas at Austin's affirmative action policy after she was denied admission.

Affirmative action has acted as a remedy to address discrimination against race, class, and gender. Many higher institutions of education have affirmative action policies in place to diversify their student population. This paper attempts to examine what it means that we are trying to dismantle affirmative action during a moment that many claim is post-racial. The Fisher v. University of Texas at Austin will determine the future of the educational system in this country. Regardless of the ruling, its influence will be felt by all.

A History of Race in the Law

The regulation of racial interaction in the United States began with required segregation, moved to forced desegregation, and is gradually returning to the legalized separation of races. As we summarize these historical events, we aim to expose the court's ambivalence in integrating the country, an ambivalence that has allowed for the current threat to affirmative action that is Fisher.

Plessy to Brown II: Desegregating the public domain

Plessy v. Ferguson, decided May 18, 1896 required "separate but equal" racial segregation in public spaces. After an attempt to sit in a railroad car designated all-white, Plessy was arrested for violating the 1890 Louisiana statute that criminalized the use of facilities designated for another race. Under the thirteenth and fourteenth amendments, Plessy argued that he was denied his rights to equality, the court did not agree.

In Plessy, the court ruled that segregation of facilities along racial lines was constitutional, so long as the facilities remained equal. This policy of "separate but equal" remained intact until 1954 when the Supreme Court decided Brown v. Board of Education. Brown was a class action suit was filed against the Board of Education of

by Leewana Thomas, Kiah Zellner-Smith, Aaron Brink-Johnson, Felicia Johnson, Isela Gomez, Jocelyne Cardona, Maya Vilaplana, Ryan Brownlow, Whitney Zilton and Grace Zaiman

the City of Topeka, Kansas in 1951. Thurgood Marshall (then with the NAACP) argued that the court's holding in Plessy encouraged state-sponsored segregation. The Brown decision "condemned segregation in education because it created a stigma of inferiority in black schoolchildren" because it "generates a feeling of inferiority as to [blacks'] status in the community that may affect their hearts and minds in a way unlikely ever to be undone". The Brown decision, in its call to "uproot deeply entrenched racism" offered a promise of equality that even the court itself was unprepared to apply in practice.

Critics of the Brown decision, and its constitutive call to desegregate, observe that the court was unprepared to set a precedent for affirmative desegregation. The court's decision was delayed a year and had to be taken up again in the case Brown II. Derrick Bell, Jr., scholar and critical theorist of race and the law, offers several critical assessments of the Brown case. One of his critiques is that the Brown decision conflates the affirmative call for desegregation with that of integration. This urge for unconditional integration is mostly "supported by middle-class blacks and whites... [because] at their socioeconomic level, integration has worked well". Bell names this critique the "interest convergence dilemma," and notes that the promises of Brown have only been taken up insofar as, and when, issues converge with the interest of the white majority.

After the court declared school segregation unconstitutional, many communities struggled to end the practice. Brown left a lot of decision making to local governments, and many schools throughout the country remained segregated. In Virginia's Prince Edward County, public schools were shut down to prevent desegregation from occurring. Black students were not able to receive an education at all, while white students attended private schools with former public-school teachers. In Brown II, Chief Justice Warren ordered local school authorities "to act with deliberate speed" to desegregate schools.

The Civil Rights Movement: Racial Equality in the Law

Throughout the 1960s, the Civil Rights movement achieved legal successes in the Civil Rights Act of 1964 and Voting Rights Act of 1965. These cases signified an effort within the law to promote equality between the races.

On July 2, 1964, President Lyndon B. Johnson signed into effect Public Law 88-352. Known as the Civil Rights Act of 1964, the law forbade discrimination based on race and sex in places of employment, businesses such as theaters and hotels, libraries and public schools and, places of "public accommodations."

The Act includes eleven titles. Title I banned unequal application of voter registration requirements though it did not successfully eliminate literacy tests at the polls. The Act made it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges or employment, because of such individual's race, color, religion, sex, or national origin."

Signed into law by President Lyndon B. Johnson on August 6th 1965, the Voting Rights Act was intended, "To enforce the fifteenth amendment to the Constitution of the United States, and for other purposes". Because there were loopholes in the 15th amendment that continued to prevent minority populations from voting, the Voting Rights Act of 1965 was meant to further protect those rights. This meant that no government was to deny a person the right to vote because of that person's race. Section 4 of the Act abolished literacy requirements that served as barriers for minority voters due to their limited access to education. Poll taxes also prevented minority voters from exercising their rights as across the South many low income communities of color were charged a fee to vote.

Backlash to Brown: Bakke, Reagan, and Grutter in the Movement to Un-do Affirmative Action

After Martin Luther King's assassination in April of 1968, there were further movements in the struggle for black equality. There was a strengthening in the black arts movement and Black studies. In conjunction with this progress of the black community came a backlash to the policies of equality enforced by Brown. In 1974, a study was commissioned at the University of Maryland with the U.S. Commission on Civil Rights, which concluded that affirmative action was working, but needed to continue its work in order to remedy historical inequities. At this point in history, the number of black students enrolled in institutions of higher education was going up quickly. In a move toward the Reagan Era, the idea of affirmative action perpetuating "reverse discrimination" was birthed. Berry argued that while there has historically been struggle within many populations that enjoy white privilege, affirmative action exists to combat structural disadvantages.

Despite arguments by scholars like Berry, the sentiment of reverse discrimination prevailed in the 1978 case of Regents of the University of California v. Bakke. Alan Bakke, a 33-year-old white male, applied to and was rejected from the medical school at the University of California. The medical school had an admissions policy that designated 16 of 100 seats for underrepresented minority applicants. Black, Chicano, Asian, and American Indian applicants were assessed separately from the pool of white applicants in an attempt to: 1. Reduce the historic deficit of traditionally disfavored minorities within medical schools and the medical profession; 2. Counter the effects of societal discrimination; 3. Increase the number of physicians who will practice in communities currently underserved, and 4. Obtain the educational benefits that flow from an ethnically diverse student body. Despite the fact that his rejection was based on his age, Alan Bakke filed his case with the Supreme Court, arguing that he was excluded from the Medical School because of his race.

The court ruled in favor of Bakke, stating that U.C. Davis' stated purposes for affirmative action were distinct from the consti-

tutional goal of ensuring diversity in the classroom. The Supreme Court ruled that while the school could consider race as a factor in a "holistic" review of each applicant, it could not set aside seats for a specific race. According to the court, U.C. Davis had used race to exclude Bakke, violating his rights to Equal Protection under the Fourteenth Amendment. The Bakke case is one in a thread of cases gradually dismantling the orders of Brown v. Board of Education. Though it upheld the constitutionality of affirmative action, Bakke narrowed the scope of affirmative action's role in admissions, and additionally introduced into law the sentiment of racial discrimination against white people.

By 1980, the American political environment was ready for Ronald Reagan's explicitly racially rhetoric. In making his case to voters in 1980, Reagan's political strategy centered around a planned assault on governmental means-tested programs like welfare. The programs, he said, disproportionately served minorities. Reagan's attack on welfare and other means-tested programs aligned with public opinion. In 1979 and 1980, at the time of Reagan's election, national support for increased spending to improve the conditions of Blacks and other minorities fell to a record low of 24% (down from 29% in 1976 and 31% in 1972.) Similarly, in 1980, 41% of respondents thought that, "blacks and other minorities should help themselves". This represented an increase from 37% in 1976 and 38% in 1972. The emerging racial conservatism within the electorate cut across racial lines, as a chasm developed between the views of Black and White Americans.

Though this paper deals specifically with the development of case law pertaining to affirmative action, it is worth mentioning the political climate from which these cases emerged. Throughout the 1980s and into the 2000s, presidents George H.W. Bush, William Clinton, and George W. Bush oversaw the creation of a political imaginary wherein white people were threatened by the societal advancements made by people of color. Political leaders publicly reinforced harmful stereotypes of supposed 'welfare queens' and accused black women of having children simply to exploit the government . Drug policies supported by all three administrations incarcerated thousands of African Americans, mostly male. Many people who are incarcerated lose the rights guaranteed to citizens; some never get those rights back. Affirmative action was successfully framed as one more "special protection" granted to minorities at the expense of white Americans.

In 2003, The Supreme Court case Grutter v. Bollinger determined that the consideration of race in acceptance policies was acceptable as part of a holistic approach. In 1997, a white woman named Barbara Grutter was denied admission to the University of Michigan Law School, despite her impressive 3.8 GPA and LSAT score of 161. The case was constructed on the notion that the University of Michigan Law School had used race as an unfairly discriminatory and heavily weighted factor in its acceptance decisions, and that it gave applicants of minority groups a better chance of getting in regardless of whether they had similar or less impressive credentials than other white applicants. She argued that her rights had been violated under the 14th Amendment and Title VI Civil Rights Act of 1964.

The court did not feel that the University of Michigan Law School used race as too dominant a factor in admissions decisions, and instead supported their holistic approach, which claimed to look at students on an individual basis and which valued other kinds of diversity besides race. The court stated that the issue of affirmative action should be re-examined in 2028.

In 2007, another case regarding race in education was brought to the Supreme Court. It resulted from a policy in Seattle that allowed high school students to apply to whatever school they wanted. The better schools received thousands of applicants and the school district needed a tie-breaking system in order to combat the problem of overcrowding. The district instituted a multi-faceted tie-breaking system, part of which was to use race as a criteria. The district was also attempting to keep racial balance in their schools (41% white, and 59% non-white). A non-profit group called Parents Involved in Community Schools sued the school district arguing that the race-based tie-breaker was unconstitutional. The Court ruled that the district could not assign students to public schools based solely on the basis of achieving racial integration. They held that racial balance in schools was not a "compelling state interest". Now the schools in Seattle are racially unbalanced. Many white students attend the schools with lots of computers and financial capital, while many of the minority students are relegated to their third and fourth choices, or to schools with fewer resources.

Scrutiny, Briefly

The "Equal Protection Clause" of the Fourteenth Amendment of the Constitution provides that "No State . . . shall deny to any person within its jurisdiction equal protection."[1] Because many laws and policies are based upon classifications that favor (or harm) one group of people more than another, the Supreme Court has established a tiered system of analysis to determine whether such laws should be permitted. Any law challenged on the basis of an Equal Protection violation is subject to this analysis and will be scrutinized accordingly. For most laws, the government need only show that there is a rational basis behind its action. For example, most forms of economic regulation, regardless of disproportionate impact, need only be rational to be upheld. When a classification is considered "suspect" the court applies its highest level of inquiry, known as "strict scrutiny." Classifications based upon race, national origin, religion, and (more often than not) alienage are subject to strict scrutiny, as are classifications that burden a fundamental right (such as the right to vote). When a classification is afforded strict scrutiny, the government is required to show that it is necessary in order to achieve a "compelling interest."

Because affirmative action programs are based upon racial classifications, government actors (such as public universities)

1 14th Amendment to the U.S. Constitution

by Leewana Thomas, Kiah Zellner-Smith, Aaron Brink-Johnson, Felicia Johnson, Isela Gomez, Jocelyne Cardona, Maya Vilaplana, Ryan Brownlow, Whitney Zilton and Grace Zaiman

must be prepared to articulate a compelling interest and to show how its policies are necessary to achieve that interest. Affirmative action programs must be "narrowly tailored" to achieve the goal at hand; a simple quota system, for example, is not specific enough to survive strict scrutiny.[2] If the court determines that there are less burdensome methods of achieving this interest, or that the interest in question is not compelling, the policy will likely be struck down. Thus far, the Supreme Court has maintained that diversity is a compelling state interest but has struck down several programs for not being narrowly tailored enough to advance this interest.

There was a 25-year period of affirmative action after Brown v Board of Education (1954) until University of California v Bakke (1978). After Bakke, affirmative action was not reestablished until Grutter v Bollinger (2003). Grutter is a second chance at leveling the racial makeup of college campuses throughout the country. In her majority opinion of Grutter, Sandra Day O'Connor wrote, "It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[3]

Only a mere nine years has passed before the Supreme Court is again analyzing affirmative action ideology via the Fisher case. How many people can effectively benefit from nine years of affirmative action? Would another 14 years of federally-backed affirmative action achieve maximum racial diversity in education in the United States? Sandra Day O'Connor imagined affirmative action as a temporary solution to a problem which has plagued the Supreme Court for generations, going back to Dred Scott v. Sandford case.

Fisher's Argument: What to expect from the Prosecution

Fisher argues that the University of Texas Austin's admission practices exceed what is necessary to maintain a diverse campus. She also asserts that UT Austin is exploiting ambiguous caselaw in order to promote race as a key factor in admission decisions.

Proponents of affirmative action who understand its usefulness as a means of establishing racial and ethnic diversity often speak of achieving a 'critical mass' of students of racial or ethnic minority status. For these proponents, the 'critical mass' is an intentionally fluid concept that allows for the changing needs of communities, the specific dynamics of certain schools, and the consideration of a myriad other social and personal factors in addition to race. This 'critical mass' does not refer to a specific and fixed "racial quota" (which would be unconstitutional per the Supreme Court precedent established in the Grutter v. Bollinger case) but rather to an ongoing effort to create "an environment where cross-racial understanding is promoted" and an analysis of whether or not the "educational benefits of diversity are realized."

Opponents of affirmative action offer several critiques of the 'critical mass' concept. One such critique points to the inconsistency of the notion itself; critics often argue that those advocating for diversity are unclear about the demands of affirmative action policy, and that this lack of clarity is often exploited for the benefit of minorities. Fisher argues that there are alternative methods to the implementation of race-conscious affirmative action currently being used by the University of Texas; if less burdensome alternatives are available it will be difficult for the University to demonstrate that its existing methods are necessary to further its compelling interest in maintaining a diverse student body. According to Fisher, race neutrality is one such equally beneficial alternative way to increase minority enrollment. Fisher argues that the race-conscious admissions under the University of Texas are not effective measures of obtaining minority enrollment because in actuality, it admits so few minorities.

Fisher also proposes the substitution of class-based programs in place of race-based programs. Fisher argues that there is a need to, "put more emphasis on the socioeconomic factors" when determining who gets admitted because it will offer another means of diversity that isn't considered in race-conscious choices. Fisher asserts that using socioeconomics as a factor would not affect the proportion of minority students attending the college.

Within the argument for revisiting Grutter is the sentiment that race is not a viable identifier but an "odious classification" defined by a multiple-choice box. Fisher maintains that the definitions set in place by UT Austin's policies disfavor Asian American students, and also favor Hispanics even though Hispanics are largely represented on campus. These inconsistencies prove the arbitrary nature of the affirmative action plan. According to Fisher, the ambiguity of UT Austin's goals of unfairly exclude non-minorities from the University.

Texas

As many argue that Texas's Top 10 Percent policy brings in minority students, affirmative action addresses gaps and flaws of that plan. The Top 10 Percent plan says that any student who graduates in the top ten percent of their high school class is automatically accepted into one of the state's public universities. The key to this plan's recruitment and enrollment of students of color is linked to the racial demographic of a certain high school. Consider for instance a high school in the Inner West side of San Antonio, a predominantly Mexican neighborhood. As the school is predominantly Latina/o, it follows that the majority of the students in the top 10 percent of a graduating class would also be Latina/o. Mr. Garre addresses the flaw in this process, "although the percentage plan certainly helps with minority admission, by and large, the – minorities who are admitted tend to come from segregated, racially

2 Gratz v. Bollinger (2003)

3 http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&navby=case&vol=000&invol=02-241&friend=nytimes (accessed 5 Dec. 2012).

by Leewana Thomas, Kiah Zellner-Smith, Aaron Brink-Johnson, Felicia Johnson, Isela Gomez, Jocelyne Cardona, Maya Vilaplana, Ryan Brownlow, Whitney Zilton and Grace Zaiman

identifiable schools."[4] This plan obviously then really only reaches minority students from high schools in which students of color are already the majority; it fails to enroll students of color that are a minority at their high schools. Affirmative Action, in its holistic consideration, is necessary to reach minority students from diverse areas, particularly minority students from predominantly white high schools.

The necessity of affirmative action also points to the goals of an improved racial climate on university campuses. The Judges in the October hearing frequently questioned Texas regarding "the end point" of race-based admissions, asking for a numerical value of a so-called "critical mass" of minority students. Justice Alito asked about the percentage of African American students in a New Mexico university, emphasizing that African American students make up a much smaller percentage of the state's demographics than do Latina/o students. Texas responded to the questions of a demographic "critical mass" by stressing that it is "not pursuing any demographic goal."[5] Justice Sotomayor, who many perceive will vote in favor of UT, again asked, "at what point do we stop deferring to the University's judgment that race is still necessary?" (48-49), According to Texas, this will be when "the University reached an environment in which members of underrepresented minorities, African Americans and Hispanics, do not feel like spokespersons for their race, members—an environment where the benefit—educational benefits of diversity are realized." (49)

Basically, Fisher is arguing reverse discrimination: the idea that her whiteness worked against her. This however is impossible to agree with when one examines whiteness as property. Whiteness can be seen as property for four reasons, which we will expand upon later, as part of our analysis. One reason most relevant to the University of Texas is the idea that whiteness is inalienable. This means that it cannot be taken away but also means that it can be seen as a transferable asset passed down through inheritance.[6] Fisher inherited this whiteness and one can see this in that her "legacy" was used as part of her admissions case. Minority groups have had no chance to set up legacies at colleges and universities because they were given less than two generations from when schools were desegregated in 1954 to when affirmative action was challenged in 1978. Abigail Fisher's legacy or whiteness actually helped her during admissions. Her average test scores were also considered.

Applicants to the University of Texas are considered under two distinct admissions categories: the Top Ten Program and General Admission. Fisher did not meet the standards in either category. In terms of merit, the current Top Ten Program represents one of the best ways to get a diverse range of elite students. Under their program students must be in the very top end of their Texas High School class, Fisher was not.

Let us next examine the 7,000 students admitted not under the Top Ten Program. The University of Texas admissions policy does not overly weigh race in its determining process but instead uses a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. We have seen a holistic approach time and time again lauded as an example of good admissions practice. Many whites with lower test scores were admitted before Fisher because their applications were found to be better..

Keeping the university's programs are a necessity because of the historical and structural racism that has existed across the country and specifically on their campus. The University of Texas is emerging from an era of race riots and racial insensitivity, including names of former slaveholders on buildings. Their current admissions policies have helped to achieve a certain level of civil understanding and sense of community. Also, thirty percent of the freshman class this year was Black or Latina/o, a welcomed change from the past. Furthermore, this new found diversity is extremely key in the classroom. For example they have a Debates on Democracy in America class where they discuss novels like "The Known World," a book about slavery. The University of Texas would argue it is important to have racial diversity in classroom that is discussing the history of race in America. Thanks to affirmative action, Asian Americans, Latina/o Americans, African Americans, and a Nigerian American student were present in the class. This type of rich diversity of racial perspective would not be present under class-based affirmative action.[7]

We imagine that class-based admissions might be an argument from Fisher for dismantling race-based admissions on campuses nationwide. The problem with this type of argument is that class-based admissions, alone, cannot provide the type of diversity on college campuses that race-based admissions provides.

Class-based policies do not take other factors, such as wealth, into account. As President Obama's Council of Economic Affairs Adviser head, Alan Krueger, has noted, "The correlation between race and family income, while strong, is not strong enough to permit the latter to function as a useful proxy for race in the pursuit of diversity."[8] Although class-based admissions can be useful they are not enough. Currently, racial gaps still exist:

> Racial gaps remain large enough that colleges would struggle to recruit as many black and Latino students without explicitly taking race into account. But some experts, like [Richard D. Kahlenberg from the Century Foundation], think they could come close. To do so, they would need to consider not just income, but also wealth, family structure and neighborhood

4 (42)
5 (48)
6 Harris, Cheryl I., Harvard Law Review , Vol. 106, No. 8 (Jun., 1993), pp. 1707-179
7 Ibid.
8 "Class-Based vs. Race-Based Admissions," The Opinion Pages, New York Times, http://www.nytimes.com/2012/11/19/opinion/class-based-vs-race-based-admissions.html?hp&_r=1& (accessed 5 Dec. 2012).

by Leewana Thomas, Kiah Zellner-Smith, Aaron Brink-Johnson, Felicia Johnson, Isela Gomez, Jocelyne Cardona, Maya Vilaplana, Ryan Brownlow, Whitney Zilton and Grace Zaiman

> poverty. Those factors disproportionately afflict black and Latino students — and hold back children from life's starting line.[9]

In other words, universities and colleges would also have to consider wealth, family structure, and neighborhood poverty order to ensure that everything under a race-neutral policy could help the college diversify its campus.

Even though there has been a trend to move towards race-neutral, class-based admissions, this is not enough to ensure all students are being represented on campuses of higher learning. In addition, little is known about the results of class-based admissions. Are they truly beneficial? No one knows because "until recently, [they] have never been implemented in the U.S. or elsewhere."[10] Fisher might argue for class-based admissions, but both class-based and race-based admissions are needed to truly diversify a campus. Just having one or the other will not move the country forward in providing equitable opportunities for all to attend the university of their choosing. Additionally, talking about class in lieu of, rather than in addition to, race, is one way of moving conversations away from white privilege and racism.

The Texas argument is crucial in this case. We claim that affirmative action is still necessary, Texas' holistic admissions process, which accompanies the Top 10 Percent Plan, has proven to be successful, and class-based admissions is not enough on its own. Texas might use these arguments to counteract Fisher's argument for getting rid of the "race box." Affirmative action in public and private schools ensures that "post-racialness" does not hide the realities of structural inequality in this country.

What we want: Our opinions, theory, how does Macalester fit in?

At first glance, affirmative action could seem to pose a dangerous threat to objectivity. It asks colleges and universities to consider factors that are not "merit based;" in fact it appears to ask admissions offices to favor some students over others. When one takes a closer look however, it is clear that an unfair status quo is historically embedded in our culture. This means that asking only "objective" questions will do nothing to disrupt traditional favoritism and will in fact perpetuate "affirmative action for white males." As much as Fisher wants to believe that her race gave her a disadvantage, she has actually been enjoying its advantages her whole life. By examining Fisher v. University of Texas, Austin case through a Critical Race Theory framework, the need for affirmative action becomes clear. Critical Race Theory brilliantly explains the reasons why a post-racial and truly colorblind society is presently unviable and unproductive.

CRT Background

Critical Race Theory emerged in the mid-1970s as a response to the gaps that Critical Legal Studies failed to address. While Critical Legal Studies dealt with problematic aspects of U.S. legal systems and social domains, it failed to address the impact of race and racism in its core analysis. Critical Race Theory also differs from Critical Legal Studies because it encourages activism and social change. The 5 major tenets of Critical Race Theory are counterstorytelling, the permanence of racism, interest convergence, Whiteness as property, and a critique of liberalism.[11] As explained by authors of What's So Critical About Critical Race Theory? Critical Race Theory "…directs attention to the ways in which structural arrangements inhibit and disadvantage some more than others in our society…it spotlights the form and function of dispossession, disenfranchisement, and discrimination across a range of social institutions, and then seeks to give voice to those who are victimized and displaced". Critical Race Theory first sheds light on racial inequalities, and then subsequently focuses its efforts on eradicating the sources that produced them.[12]

As a society that has been told to strive for equality above all things, the unfixed racial disparities of the past force us to now consider an alternative route to parity that surprisingly rejects the equal treatment of all. Critical Race Theorists encourage us to discard our obsession with equality, which "assumes that [all] citizens have the same opportunities and experiences" and to instead turn our attention to equity, which "recognizes that the playing field is unequal and attempts to address the inequality".[13] UT Austin's argument to sustain their affirmative action policy is founded upon ideas produced by Critical Race Theorists. Understanding a couple of key Critical Race Theory concepts will put UT Austin's argument into a larger context.

Colorblindness

Simply put, a colorblind society is a society where race doesn't matter at all. It might have been beneficial during Jim Crow, but due to the ways our society still privileges whiteness, supporting colorblind policies today continues to perpetuate racial discrimination against people of color.

Neil Gotanda, a founding Critical Race Theorist, explains that colorblindness is not a solution to the subtle forms of racism found in society today because it ignores (and therefore exacerbates) historical inequalities that must be acknowledged if one seeks to understand present day racial disparities.[14] He explains two main

9 "Rethinking Affirmative Action," Opinion Pages, New York Times, http://www.nytimes.com/2012/10/14/sunday- review/rethinking-affirmative-action.html?_r=1&pagewanted=all (accessed 5 Dec. 2012).

10 Rohan Mascarenhas, "Fisher v. University of Texas and Race-Based Affirmative Action: An Interview with Sigal Alon," RSF Review, Russell Sage Foundation, http://www.russellsage.org/blog/fisher-v-university-texas-and-race-based-affirmative-action-interview-sigal-alon (accessed 5 Dec. 2012).

11 (Decuir & Dixson, 27)

12 A.J. Treviño et al., What's so Critical About Critical Race Theory? Contemporary Justice Review. 11.1 (2008): 7-10. Print.

13 13 DeCuir, Jessica T., and Adrienne D. Dixson. 2004. "So When It Comes Out, They Aren't That Surprised That It Is There" Using Critical Race Theory as a Tool of Analysis of Race and Racism in Education". Educational Researcher. 33 (5): 26-31.

14 Crenshaw, Kimberlé. 1995. Critical race theory: the key writings that formed the movement. New York: New Press.

by Leewana Thomas, Kiah Zellner-Smith, Aaron Brink-Johnson, Felicia Johnson, Isela Gomez, Jocelyne Cardona, Maya Vilaplana, Ryan Brownlow, Whitney Zilton and Grace Zaiman

understandings of race, one of which functions in connection to the past, and one which operates completely apart from it. Fisher bases her argument on the latter. When societal conceptualizations of race are taken out of a historical context, they become simple physical characteristics. Gotanda asserts that these "individualized views of racism" are harmful because they "exclude an understanding of the fact that race has institutional or structural dimensions beyond the formal racial classification". Disconnecting racism from the past makes it seem like it's only connected to a person's skin color, and not to a history saturated with a violent racial hierarchy.[15] Fisher's argument is deeply rooted in this type of individualistic, historically-severed lens.

Whiteness as Property

Cheryl Harris, another important figure in the emergence of Critical Race Theory wrote a key article on how Whiteness functions as a type of property. Tracing its history back to slavery, possessing whiteness allowed one to possess freedom. That meant survival. In the 1790s, through the passing of the Naturalization Act, possessing Whiteness allowed one to be a citizen. That meant privilege. Throughout the ages, being white has come with innumerable benefits and privileges. It has been (and still is) a vital and coveted possession for survival and success. Why would light-skinned slaves deny their own racial identities in attempts to "pass" as white if there were no great advantage to it? Why do people sue to be considered Caucasian? As stated earlier, property is widely defined as anything that can have a value attached to it or something that someone can have a right to. Harris states that the "liberal view of property is that it includes the exclusive rights of possession, use, and disposition...the right to transfer or alienability, the right to use and enjoyment, and the right to exclude others".[16] Conceptualizing Whiteness as property allows us to better understand why Fisher feels the way she does about her spot at UT Austin, and helps dispel the notion that affirmative action is reverse discrimination in disguise.

Fisher has been socialized to believe that her credentials grant her access to entry in UT Austin. As an educated white female, Fisher is under the false impression that she is entitled to a spot at this school and believes her place has been unfairly "stolen" from her. She is greatly unaware of the many other privileges she enjoyed to get to where she is today and the many times her whiteness has given her an advantage over people of color. And now, when the privileges she didn't even know she had fail her, she believes she has been a victim of "reverse discrimination". We acknowledge that Abigail Fisher may not have intentionally used her whiteness to get to where she is, but we do ask her (and others like her) to acknowledge their position in a society that has historically, and continues to, function in their favor. Affirmative action seeks to balance this inequity.

People also tend to draw parallels between reverse racism and affirmative action policies. Harris counters this accusation with a very profound analysis . While it may seem that students of color who get into institutions of higher education are being granted acceptance based on skin color (blackness/brownness as property) Harris observes that the objectives between racial discrimination and affirmative action diverge drastically. Affirmative action seeks not to create a superior race, or to subordinate whites, but instead tries to help out those who have been already been racially subordinated[17]. To equalize the playing field entails more than race-neutral policies. Extra measures must be taken ensure equity. Explained by Harris,

> Rereading affirmative action to delegitimate the property interest in whiteness suggests that if, historically, the law has legitimated and protected the settled whites' expectations in white privilege, delegitimation should be accomplished not merely by implementing equal treatment but also by equalizing treatment among the groups that have been illegitimately privileged or unfairly subordinated by racial stratification.[18]

Multiculti-calester

Macalester, as a private institution, is not affected by affirmative action caselaw in the same way that public schools are. Macalester chooses to include "multiculturalism" and "internationalism" as examples of its pillars to market itself as an open campus, not because it is legally bound to include affirmative action in its admissions policies. Historically, the college has struggled to enforce affirmative action policies in its foundation.

In 1968, Macalester began an Equal Educational Opportunities Program (EEO) to bring in more domestic students of color to campus. The program received enough funds to bring in 75 domestic students of color. EEO began just as the college went through a period of financial crisis. EEO started with a push from then-president Arthur Flemming. After DeWitt Wallace pulled his financial backing from the college in 1970, and a financial crisis ensued.[19] Flemming soon left the college, and was replaced by President John B. Davis. With consent by both the administration and trustees, EEO was severely cut to help cut down costs of the college.[20]

In 1975, 12 faculty members were told they might not be on the payroll the next year because of budget cuts, and the faculty fought back. 61 out of 135 faculty signed a petition asking the Trustees minority education review committee to cut 60% of the EEO program at Macalester. This number does not include faculty who had been at Macalester longer than 3 years or who served on

15 Ibid.
16 Ibid.
17 (299)
18 (Harris, 288)
19 Gearino, Dan. "Multiculti-calester." The Mac Weekly. Mac Weekly Archives, 19 March 1998. Web. 11 Dec. 2012.
20 Boyle Rachel, "Expanding Educational Opportunities (EEO) at Macalester College, 1968 -1975," Tapestries, 1, no. 1 (Spring 2011), http://digitalcommons.macalester.edu/cgi/viewcontent.cgi?article=1035&context=tapestries

"sensitive committees." One of the three suggested negotiation provisions stated that "the aid Macalester gives to high-need minority students should be reduced from 50 percent to no more than 20 percent of total student aid offered, and more low and middle need minority students should be recruited under general scholarship programs." This suggests that recruiting domestic students of color was not a priority of the college. Ultimately, the Trustees voted to cut the EEO program by 40%.[21] EEO only had enough funding to bring in 22 students. By 1979, the graduation rate for domestic students of color was only 14.6%.[22] The reduction of the EEO program happens around the same time as the Bakke case. While the Supreme Court pushes back against affirmative action in higher education throughout the country, Macalester's number of successful domestic students of color dwindled.

Moving forward to 2001, psychology professor Roxane Gudeman (now professor emeritus), wrote a case study about how Macalester faculty and staff positively discussed the benefits of diversity on campus and in classrooms. The majority of faculty agreed that diversity in the classrooms was beneficial for White students.[23] This might lead one to assume Macalester was a supporter of affirmative action. On May 6, 2002, Walter Mondale gave a speech on campus titled Sideman: Reflections on the Vice Presidency. In his speech, he documents his struggle with affirmative action with the Bakke case since his campaign with Carter was focused on civil rights. He elaborates on how the Supreme Court "endorsed" their decision and how "Justice Powell's opinion became the guiding principle for nearly twenty-five years of progress in increasing access of minorities to American higher education."[24] Mondale did not support affirmative action as we know it today. Mondale gave his speech not only as an alumnus of Macalester College, but as a financial supporter of the college. One might presume someone so invested in the college would agree with Macalester's admissions policies.

As stated earlier in the paper, being accepted to college is only a small part of the battle for many students of color. Affirmative action is not beneficial if students of color do not achieve high graduation rates. When analyzing 6-year graduation rates, they vary by geography and individual schools. Nationally, 60 percent of whites but only 49 percent of Latinos and 40 percent of African Americans graduate with a bachelor's degree.[25]

Macalester, along with several other private liberal arts colleges, signed a brief supporting Bollinger in 2003, making a commitment to maintaining racial diversity on its campus.[26] Macalester has made a public statement of approval, but this does not cross over to its admissions practices. Using Macalester's entering class of 2005 as an example, only 75% of Black students and 80.6% of Latin@ students completed their degrees within six years of entering Macalester, compared to 88.1% of White students.[27]

These statistics are from an institution which signed an amicus brief advocating for UT Austin, stating a position pushing for racial diversity in higher institutions. Because Macalester is a private institution, it is not required to adhere to any legal standards. Regardless of the Supreme Court's decision, Macalester needs to make a realistic commitment to creating and maintaining a more diverse campus, welcoming both international students and domestic students of color. Domestic students of color will continue to leave Macalester at higher rates than Whites without the support of the institution. As a private institution, Macalester supports affirmative action but still fails to diversify its campus. Regardless of the outcome of the Fisher case, Macalester needs to show more of a commitment to domestic diversity.

Conclusion

To conclude, the fight for equal access to education and to property is not over. Critical Race Theory demonstrates the ways in which a historically contextualized understanding of race supports and explains University of Texas, Austin's argument for their affirmative action plans. Many arguing for Fisher believe that all students have had an equal chance at success because racism is no longer an obstacle to social mobility and success. The problem with this way of thinking is that it ignores the collective historical disadvantages that students of color start out with and continue to face through their years. UT Austin seeks to help level the playing field by taking into account the race of some students of color who may have encountered more difficulty than white students on their journey to college. Critical Race Theory asks us all to acknowledge the disadvantages that students of color have faced in the past and continue to face today. It also asks whites to acknowledge, whether they like it or not, their place in a society that benefits them over everyone else. Looking at the situation in a holistic manner versus through a narrowly individualistic lens helps explain why affirmative action is a necessary measure for racial justice and how its objectives do not align with those of racism or discrimination. ❐

21 Wilson, Jane. "Trustees approve a 40% EEO budget cut." Mac Weekly. Mac Weekly Archives, 18 April 1975. Web. 10 Dec. 2012.

22 Levine, Jane. "Some profs ask for 60% EEO cut." The Mac Weekly. The Mac Weekly Archives, 11 April 1975. Web. 7 Dec. 2012.

23 http://www.eric.ed.gov/ERICWebPortal/search/detailmini.jsp?_nfpb=true&_&ERICExtSearch_SearchVal ue_0=ED456203&ERICExtSearch_SearchType_0=no&accno=ED456203 (accessed 6 Dec. 2012).

24 http://www.hhh.umn.edu/news/mondale/pdf/sideman.pdf (accessed 6 Dec. 2012).

25 http://www.edtrust.org/dc/press-room/press-release/reports-reveal-colleges-with-the-biggest-smallest- gaps-in-minority-gradu (accessed Dec. 6 2012).

26 http://www.vpcomm.umich.edu/admissions/legal/gra_amicus-ussc/um/Amherst-both.pdf (accessed 6 Dec. 2012).

27 http://www.macalester.edu/ir/grad_rates.htm (accessed 6 Dec. 2012).